

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Submitted on Briefs June 17, 2009

MICHAEL LAWRENCE TRUE
v.
WENDY SUE ROBINSON-TRUE

Appeal from the Circuit Court for Davidson County
No. 05D-2560 Carol Soloman, Judge

No. M2008-02240-COA-R3-CV - Filed December 9, 2009

This appeal involves divorce support obligations. The parties have three minor children. During the marriage, the husband worked construction and the family moved often. After both parties filed for divorce and moved away from Tennessee, the husband left his employment in construction to become a full-time student attending chiropractic school. After trial, the trial court designated the wife as the children's primary residential parent and determined the husband's earning capacity, for purposes of child and spousal support, at the level it found he had earned in prior construction work. The husband was ordered to pay child support, alimony *in solido*, and transitional alimony. The husband filed a motion to alter or amend arguing, *inter alia*, that his total monthly support obligation exceeded his ability to pay. The trial court granted his motion in part and reduced the total monthly support obligation. The husband now appeals, challenging the determination of his earning capacity, the amount of child support, and the alimony awarded by the trial court. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

HOLLY M. KIRBY, J., delivered the opinion of the Court, in which ALAN E. HIGHERS, P.J., W.S., and J. STEVEN STAFFORD, J., joined.

Thomas F. Bloom, Nashville, Tennessee, for the Plaintiff/Appellant Michael Lawrence True

Philip E. Smith, Nashville, Tennessee, for the Defendant/Appellee Wendy Sue Robinson-True

MEMORANDUM OPINION¹

FACTS AND PROCEDURAL HISTORY

Plaintiff/Appellant Michael Lawrence True (“Husband”)² and Defendant/Appellee Wendy Sue Robinson-True (“Wife”) were married in December of 1997 in Iowa. During the course of the marriage, the parties relocated multiple times, ultimately settling in Nashville. At the time of the trial in the court below, they had two minor children,³ and both parties had moved to Iowa. While the proceedings in the trial court involved myriad issues, the issues on appeal are limited to financial concerns. As such, we outline only the facts pertinent to those issues.

Husband has taken some college courses but does not have a college degree. Wife has a college degree; after the parties’ children were born, Wife worked in jobs such as a hotel catering manager and at a bridal shop. During the course of the marriage, Husband worked in the construction industry.

After living initially in Illinois, Husband and Wife relocated to North Carolina in 1998 so that they could have a “fresh start.” Husband eventually found employment in construction with a company named Hensil Phelps, building the Carolina Hurricanes’ hockey arena. Wife worked full-time at a bridal shop for \$8 per hour.

After working on the hockey arena, later in 1998, the parties moved to Florida to enable Husband to do construction work on a NASA launch pad construction project for the same employer. By the summer of 1999, Husband’s employment with Hensil Phelps had ended. He began working as an independent contractor, doing jobs such as painting and tile work for a local real estate company. Wife worked two jobs, earning \$8.50 per hour at a bridal shop and \$10 per hour as a catering manager at a Holiday Inn.

¹ **Rule 10. Memorandum Opinion**

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated “MEMORANDUM OPINION”, shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

Tenn. Ct. App. R. 10.

² In the proceedings below, Husband was represented by several different attorneys. Husband’s attorney in this appeal apparently advised him from time to time in the proceedings below but did not represent him.

³ The record indicates that the parties’ third child died prematurely in a tragic accident.

In Florida, the parties began to experience financial difficulties. In 1999, Wife procured interest free deferrable student loans and used the proceeds to pay for expenses such as groceries and gas.

In early 2000, the parties relocated to Nashville to be closer to Wife's family, still in Iowa. While Husband looked for employment, Wife began working with her brother at Gold's Gym. Within a month, Husband found construction work, and several months later took another construction job building a Social Security Administration building in Kentucky, earning approximately \$800 per week. Meanwhile, the parties' first child was born in October 2000. After that, Husband ceased commuting to Kentucky and in late 2000 he returned to Nashville to be with the family. His Nashville employer, Oakley Construction, paid Husband approximately \$800 per week during the five to six month term of his employment.

In mid- 2001, Husband's employment with Oakley Construction ended and he began his own construction business. Husband operated his construction business as a sole proprietorship until the end of 2005. The parties continued to experience financial difficulties; their tax returns show that, for the years 2002 through 2005, Husband's business produced income of \$4461; \$2106; \$11,751; and \$12,862, respectively. Not surprisingly, the parties' credit card debt increased substantially during this time period.

In June 2005, the situation came to a head, and Wife informed Husband that she wanted a divorce. Wife decided to return to Iowa to be with her family. A few weeks later, Husband filed a complaint for divorce alleging irreconcilable differences and inappropriate marital conduct, and after that, Wife filed a counter complaint for divorce on the same grounds.

While the divorce petitions were pending, Husband wound up his business in Tennessee. He moved to Illinois in December 2005. Husband initially found employment in Illinois at a nuclear power plant, and then as a carpenter. Both positions were full-time and paid \$22 per hour. After several months of carpentry work in Illinois, Husband terminated his employment to enroll full-time in school to become a chiropractor. Husband remained an unemployed full-time student through the divorce trial.

The parties' divorce trial was held on August 28, 2007. The evidence at trial consisted primarily of the parties' testimony.

At trial, Wife contended that the student loans she obtained in 1999 were marital debt because she took out the loans in order to pay the family's expenses. Husband disputed Wife's assertion, claiming that Wife's 1999 student loans were taken out to consolidate her earlier student loans. Likewise, Husband disputed Wife's assertion that the credit card debt accumulated from 2002 to 2005 was to pay marital expenses, but had no evidence other than his testimony to support his contention. To explain his decision to quit construction work and go to school full-time to become a chiropractor, Husband testified that living in a state such as Illinois or Iowa, construction work could be done only seasonally. He had long wanted to become a chiropractor, and felt he could better support his children by leaving construction and become a chiropractor.

After hearing the parties' testimony, the trial court found expressly that Husband's testimony was not credible. It granted Wife a divorce on grounds of inappropriate marital conduct. In its oral findings on Husband's earning capacity, the trial court stated:

Husband's own testimony [is that] he had the ability to make, of course if he worked full time on the jobs, he said he worked overtime, he made \$22 an hour when he worked. I don't know what 20 days in jail is going to do for his schooling so I think he'll probably have to get out and be a carpenter. I presume his schooling is over. So I think at \$22 an hour – when he was making \$18 an hour he could have made between 55 and 92,000 in North Carolina. He decided to go where he could make \$22 an hour. And he said that his first job there he made 80 to 90 hours a week, which should be about \$5500 a month. But without working any overtime, I find he has the ability to make \$3784 a month. And he needs to go back with the Carpenter's Union where he makes \$22 an hour and where he has that insurance.

Thus, the trial court determined Husband's earning capacity to be \$3784 per month. Wife received an award of child support, as well as alimony, both *in solido* and transitional. The award of alimony *in solido* included half of the credit card and student loan debt in Wife's name.

On October 2, 2007, the trial court entered the final decree of divorce. Husband then filed a motion to alter or amend, asserting that he was not capable of making the total monthly payment required of him in the final decree of divorce. On January 31, 2008, the trial court granted Husband's motion to alter or amend in part; it lowered his total monthly support payment to \$1,838.33, but declined to lower the total amount of the award. Husband now appeals.

ISSUES ON APPEAL AND STANDARD OF REVIEW

On appeal, Husband raises the following issues:

1. Whether the trial court erred in determining Husband's earning capacity.
2. Whether the trial court erred in awarding child support of \$905 per month.
3. Whether the trial court erred in awarding Wife alimony *in solido* of \$37,551.69 and transitional alimony of \$11,988.88, payable at \$333.33 per month.

Because this case was tried by the trial court sitting without a jury, we review the findings of fact *de novo* upon the record with a presumption of correctness unless the evidence preponderates otherwise. *See* TENN. R. APP. P. 13(d); **Hudson v. Hudson**, No. M2008-01143-COA-R3-CV, 2009 WL 3631017, at *5 (Tenn. Ct. App. Nov. 3, 2009), *no perm. app.* On review, considerable deference is given to the trial court's determinations of the witnesses' credibility because "the trial court [had] the opportunity to observe the witnesses' demeanor and [heard] the in-court testimony." **Interstate Mech. Contractors, Inc. v. McIntosh**, 229 S.W.3d 674, 678 (Tenn. 2007) (citing **Tobitt v. Bridgestone/Firestone, Inc.**, 59 S.W.3d 57, 61 (Tenn. 2001); **McCaleb v. Saturn Corp.**, 910 S.W.2d 412, 415 (Tenn. Workers Comp. Panel 1995)). The trial court's conclusions of law are reviewed *de novo* with no presumption of correctness. **Hudson**, 2009 WL 3631017, at *5 (citing **Nelson v. Wal-**

Mart Stores, Inc., 8 S.W.3d 625, 628 (Tenn. 1999)). We review the trial court's award of alimony, both transitional and *in solido*, under an abuse of discretion standard. ***See Goodman v. Goodman***, 8 S.W.3d 289, 293 (Tenn. Ct. App. 1999) (citing ***Ingram v. Ingram***, 721 S.W.2d 262, 264 (Tenn. Ct. App. 1986)).

ANALYSIS

Husband first argues that the trial court erred in finding that his earning capacity was \$3784 per month. He argues that the evidence does not support the trial court's determination because Husband's testimony that he cannot do construction work full-time year round due to unpredictable weather was never rebutted.

Even when there is not evidence specifically disputing an assertion by a witness, the trial court may nevertheless find the witness not credible and decline to credit his testimony. ***See Roberts v. Ray***, 322 S.W.2d 435, 437-38 (Tenn. Ct. App. 1959). On appeal, we are bound to give considerable deference to the trial court's determinations of credibility. ***See Interstate Mech. Contractors, Inc.***, 229 S.W.3d at 678 (citing ***Tobitt***, 59 S.W.3d at 61; ***McCaleb*** 910 S.W.2d at 415). Here, the trial court plainly stated it did not find Husband to be credible, noting in particular inconsistencies in his testimony concerning his past income figures. Moreover, Husband acknowledged that the weather did not render his work in construction seasonal when the parties resided in North Carolina. According appropriate deference to the trial court's assessment of the witnesses' testimony, we cannot conclude that the evidence preponderates against the trial court's finding on Husband's earning capacity.

Husband also asserts that the trial court erred in awarding child support of \$905 per month. Specifically, Husband argues that the child support award is erroneous insofar as it is based on the trial court's determination of Husband's earning capacity. Because we have concluded that the trial court did not err in determining Husband's earning capacity, we likewise conclude that the trial court did not err in using that figure to calculate Husband's child support obligation.

Husband also argues on appeal that the trial court erred in awarding Wife alimony *in solido* in the amount of \$37,551.69 and transitional alimony in the amount of \$11,988.88. To support this contention, Husband argues first that Wife's student loan and her credit card debts should not have been included in the alimony *in solido* award because the evidence does not support a finding that they were marital debts.

In the trial court below, both parties testified about Wife's student loans and the credit card debt in her name. Wife testified that the parties experienced financial difficulties from as early as 1999 until their separation in 2005. In support of her testimony, she submitted the parties' tax returns as evidence, showing that Husband's business generated relatively little income from 2002 until 2005. In his testimony, Husband denied using the funds at issue for marital debts, but acknowledged that the parties had so many credit cards and charges that he could not account for them with any degree of specificity.

“Trial courts have broad discretion concerning the amount and duration of spousal support.” *Goodman v. Goodman*, 8 S.W.3d 289, 293 (Tenn. Ct. App. 1999) (citing *Jones v. Jones*, 784 S.W.2d 349, 352 (Tenn. Ct. App. 1989)). Viewing the record as a whole and according appropriate deference to the trial court’s assessment of the parties’ credibility, we cannot conclude that the trial court erred in finding that Wife’s student loan and credit card debts were marital debts. Consequently, we find no error in the trial court’s decision to base the award of alimony *in solido* on those marital debts.

Finally, Husband argues that the trial court erred in the alimony award because the total obligation placed upon him exceeds his ability to pay. On appeal, Husband points out that his total support obligation of \$1838.33⁴ per month does not include expenses such as insurance for the children in the amount of \$197.70 per month and other expenses for which the amount was unknown at the time of trial, namely, the cost of insurance for Wife and counseling for the children. Husband claimed a frugal \$1762.70 per month in living expenses. He notes that the total of these exceeds even the earning capacity assigned to him by the trial court, and thus exceeds his ability to pay. Husband cites *Goodman v. Goodman*, 8 S.W.3d 289, 295 (Tenn. Ct. App. 1999), in arguing that the trial court erred in ordering alimony in excess of the obligor spouse’s ability to pay.

The most important factors in making an award of alimony are the need of the obligee spouse and the ability to pay of the obligor spouse. *Nieman v. Nieman*, No. M2008-02654-COA-R3-CV, 2009 WL 2707403, at *3 (Tenn. Ct. App. Aug. 27, 2009), *no perm. app.* (citing *Riggs v. Riggs*, 250 S.W.3d 453, 457 (Tenn. Ct. App. 2007)). Clearly, the trial court was presented with a situation in which there was simply not enough money to go around. From our review of the overall record, we cannot conclude that the trial court’s decision constitutes an abuse of discretion. Therefore, we affirm the trial court’s award of alimony *in solido* and transitional alimony.

CONCLUSION

The decision of the trial court is affirmed. The costs of this appeal are taxed to the Appellant Michael Lawrence True, and his surety, for which execution may issue if necessary.

HOLLY M. KIRBY, JUDGE

⁴ After the trial court reduced the monthly amount due for alimony and attorney fees in response to Husband’s motion to alter or amend, the total monthly support obligation was as follows: \$905 for child support, \$500 for alimony *in solido*, \$333.33 for transitional alimony, and \$100 for attorney fees. From the record, it appears that on September 3, 2008, the trial court entered an agreed permanent parenting plan order reducing Husband’s monthly child support obligation to \$755.